

11-1-2010

Maclay v. Idaho Real Estate Com'n Clerk's Record Dckt. 37946

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LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

MICHAEL SCOTT MACLAY,
PETITIONER-APPELLANT,

VS.

IDAHO REAL ESTATE COMMISSION,
RESPONDENT-RESPONDENT ON APPEAL.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

Hon KATHRYN A. STICKLEN, District Judge

MICHAEL S. MACLAY

Appellant Pro Se

KIRTLAN G. NAYLOR

Attorney for Respondent

FILED - COPY

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Supreme Court District of Appeal
Return on AFS by

37946

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL SCOTT MACLAY,

Petitioner-Appellant,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent-Respondent on Appeal.

Supreme Court Case No. 37946

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE KATHRYN A. STICKLEN

MICHAEL S. MACLAY

APPELLANT PRO SE

SPOKANE VALLEY, WASHINGTON

KIRTLAN G. NAYLOR

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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Michael Scott Maclay vs. Idaho Real Estate Commission

Date	Code	User		Judge
4/17/2009	NCOC	CCGARDAL	New Case Filed - Other Claims	Kathryn A. Sticklen
	PETN	CCGARDAL	Petition for Judicial Review	Kathryn A. Sticklen
	MISC	CCGARDAL	Declaration of Service	Kathryn A. Sticklen
4/27/2009	NOAP	CCTOWNRD	Notice Of Appearance (Kirtlan Naylor for Respondent)	Kathryn A. Sticklen
4/28/2009	OGAP	DCTYLENI	Order Governing Judicial Review	Kathryn A. Sticklen
5/7/2009	NOTC	CCWRIGRM	Notice of Lodging of Agency Record - Proceedings Not Transcribed	Kathryn A. Sticklen
5/29/2009	NOTC	MCBIEHKJ	Notice of Filing Agency Record	Kathryn A. Sticklen
	MISC	MCBIEHKJ	Agency Record	Kathryn A. Sticklen
6/1/2009	OBJE	CCBURGBL	Objection to Motion for Order Authorizing Payment of Transcript	Kathryn A. Sticklen
6/9/2009	MOTN	CCAMESLC	Motion for Order Authorizing Payment of the Transcript from District Court Funds and Objection to Notice of Lodging of Agency Record	Kathryn A. Sticklen
	MISC	CCAMESLC	Declaration of Michael Scott Maclay	Kathryn A. Sticklen
	DECL	CCANDEJD	Declaration Filed of Michael Scott Maclay	Kathryn A. Sticklen
	MOTN	CCANDEJD	Motion for an Order Authorizing Payment of the Transcript from District Court Funds and Objection to Notice of Lodging of Agency Record	Kathryn A. Sticklen
6/26/2009	ORDR	DCTYLENI	Order Denying Motion for an Order Authorizing Payment of Transcript from the District Court Funds (21 days to reply)	Kathryn A. Sticklen
7/16/2009	AFFD	MCBIEHKJ	Affidavit of Michael Scott Maclay	Kathryn A. Sticklen
	AFFD	CCBOYIDR	Affidavit	Kathryn A. Sticklen
8/28/2009	ORDR	DCTYLENI	Order Re: Payment of Transcript Fee	Kathryn A. Sticklen
8/31/2009	OBJC	CCSIMMSM	Supplement to Respondent's Objection to Petitioner's Motion for An Order Authorizing Payment of the Transcript from District Court Funds and Objection to Notice of Lodging of Agency Record	Kathryn A. Sticklen
10/6/2009	REPT	CCBOYIDR	Report on Bankruptcy and Motion to Dismiss Petitioner's Petition for Judicial Review	Kathryn A. Sticklen
10/7/2009	NOTC	CCBOURPT	Notice of Lodging Transcript	Kathryn A. Sticklen
10/22/2009	RSPN	CCSIMMSM	Petitioner's Response to Motion to Dismiss Petition for Judicial Review	Kathryn A. Sticklen
	RSPN	CCBOYIDR	Petitioners' Response to Motion to Dismiss Petition for Judicial Review	Kathryn A. Sticklen
10/23/2009	ORDR	DCTYLENI	Conditional Order Dismissing Petition for Judicial Review	Kathryn A. Sticklen
10/27/2009	HRSC	CCAMESLC	Notice of Hearing (Motion to Dismiss 11/13/2009 03:00 PM)	Kathryn A. Sticklen
10/30/2009	MOTN	MCBIEHKJ	Motion for Reconsideration	Kathryn A. Sticklen

00003

Michael Scott Maclay vs. Idaho Real Estate Commission

Date	Code	User	Judge
11/13/2009	DCHH	CCCHILER	Hearing result for Motion to Dismiss held on 11/13/2009 03:00 PM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: less than 100
	BREF	CCPRICDL	Petitioner's Brief in Support of Petition for Judicial Review
11/23/2009	MOTN	CCBOYIDR	Respondent's Motion to Stay Briefing Schedule
	MOTN	CCBOYIDR	Respondent's Motion to Dismiss
12/4/2009	RSPN	CCWRIGRM	Petitioners Response to Respondents Motion to Dismiss
12/15/2009	BREF	CCAMESLC	Respondent's Reply Brief Regarding Motion to Dismiss
	BREF	CCAMESLC	Respondent's Reply Brief Regarding Motion to Stay
12/18/2009	MISC	MCBIEHKJ	Declaration of Michael Scott Maclay
1/27/2010	DEOP	DCTYLENI	Memorandum Decision and Order
2/26/2010	BREF	CCWATSCL	Respondent Idaho Real Estate Commission's Reply Brief to Petitioner's Petition for Judicial Review
3/18/2010	REPL	MCBIEHKJ	Reply to Response Brief
4/12/2010	MISC	DCTYLENI	Reply to Response Brief (Notice of Hearing 5/17/10 @ 3:30 p.m.)
4/15/2010	HRSC	DCTYLENI	Amended Notice of Hearing- Scheduled (Oral Argument on Appeal 05/18/2010 03:30 PM)
5/18/2010	HRHD	CCGARDAL	Hearing result for Oral Argument on Appeal held on 05/18/2010 03:30 PM: Hearing Held No Court Reporter Present
6/28/2010	DEOP	DCTYLENI	Memorandum Decision and Order
	CDIS	DCTYLENI	Civil Disposition entered for: Idaho Real Estate Commission, Defendant; Maclay, Michael Scott, Plaintiff. Filing date: 6/28/2010
	STAT	DCTYLENI	STATUS CHANGED: Closed
8/6/2010	APSC	CCTHIEBJ	Appealed To The Supreme Court
	MOTN	CCTHIEBJ	Motion For Order To Waive Notice Of Appeal Filing Fees, Cost For Record And Cost For Transcripts
	AFFD	CCTHIEBJ	Affidavit Of Michael Scott Maclay
8/20/2010	ORDR	DCTYLENI	Order for Waiver of Costs on Appeal (Filing Fee and Clerk's Record waived)

RECEIVED

APR 16 2009

1114

APR 17 2009

Ada County Clerk

Michael Scott Maclay
Petitioner (Pro Se)
3304 N. Park Road
Spokane Valley, WA 99212
(509) 714-7974

IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Michael Scott Maclay,

Petitioner

vs.

Idaho Real Estate Commission,

Respondent

Case No.

CV 08-0907296

PETITION FOR JUDICIAL REVIEW
IDAHO REAL ESTATE COMMISSION
CASE NO: 07-01500

TO: The Idaho Real Estate Commission and its attorney, KIRTLAN NAYLOR; and

TO: The Clerk of the Ada County District Court.

Petitioner, MICHAEL SCOTT MACLAY, petitions for judicial review of the Final Administrative Order dated March 19, 2009, (issued on March 20, 2009), of the IDAHO REAL ESTATE COMMISSION under Case Number 07-01500, (referred to in the Petition as "Final Order"). Petitioner has the right to appeal the Final Order under the rules of the Idaho Real Estate Commission and pursuant to I.A.R. Rule 11. Petitioner has timely filed this Petition. The procedural background is set forth below.

1. On January 26, 2007, a broker, John Runkle, who had worked with Petitioner, and Petitioner's Washington broker, and who had initially approved his business plan filed a complaint with the Idaho Real Estate Commission against Petitioner.

PETITION FOR JUDICIAL REVIEW- 1

00005

2. On May 23, 2008, the Executive Director, Jeanne Jackson-Heim, of the Idaho Real Estate Commission, (referred to as "Respondent" in this Petition), filed a Formal Administrative Complaint against Petitioner.
3. Petitioner requested a hearing, which was held in Boise on November 5, 2008. On November 21, 2008, Hearing Officer, Jean R. Uranga, issued Findings of Fact, Conclusions of Law and Recommended Order.
4. In early December 2008, Petitioner retained an attorney, Timothy Tyree, who submitted a Motion for Reconsideration to the Hearing Officer on his behalf. Included with this Motion was a Memorandum in Support of Motion for Reconsideration containing significant key points of fact and legal analysis which were not addressed by the Hearing Officer or Respondent in its presentation of its case. It appears that the Hearing Officer chose not to respond to Petitioner's motion, thus effectively denying the request for reconsideration.
5. The Hearing Officer's Recommended Order came before Respondent at its regularly scheduled meeting on March 19, 2009, for review. Respondent allegedly, conducted a so called "independent review" of the record, including exhibits, but did not respond in any specific way to Petitioner's Memorandum described in the previous paragraph.
6. Respondent issued its Final Order on March 20, 2009, adopting the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order in its entirety. The Final Order revokes Petitioner's Idaho Real Estate License, requires him to pay a civil fine of \$5,000.00, and also requires him to pay costs and attorney fees in an as yet to be determined amount.
7. At this time, a transcript of the Agency hearing has not been produced; Apparently, Respondent did not order a transcript at the time of the hearing. Petitioner reserves the right to request that it be made a part of this petition for review.

1
2 8. Petitioner is also requesting the inclusion of all documents that would normally
3 automatically be included in the agency's record under Rule 28, I.A.R. In addition,
4 Petitioner specifically requests that Petitioner's Memorandum in Support of Motion
5 for Reconsideration from December of 2008, be included in the agency record. If
6 there is a reasonable cost to prepare the documents in the agency's record, then
7 Petitioner understands that he may have to pay it.

8
9 9. No part of the Final or Recommended Order has been sealed.

10 10. The filing fee has been paid, and all parties have been served.

11 **PRELIMINARY STATEMENT OF ISSUES ON APPEAL**

12 The following is a preliminary statement of the issues on appeal. Petitioner understands
13 that this preliminary statement does not prevent him from asserting other issues on appeal.
14 The Hearing Officer failed to organize Findings of Facts or Conclusions of Law by number
15 so generally Petitioner denies the Findings of Facts to the extent they contradict the facts
16 presented by Petitioner at the Hearing on November 5, 2008, and as presented in
17 Petitioner's Memorandum in Support of Motion for Reconsideration submitted to the
18 Hearing Officer in December of 2008. Petitioner also asserts that the Conclusions of Law
19 in the Recommended Order are incorrect as specifically stated below:

- 20
21 1. Whether, at any time material to this matter, Petitioner violated Idaho Code section
22 54-2040(5) which provides that a salesperson shall not use another person's
23 broker's license;
- 24 2. Whether, under the facts, Petitioner violated Idaho Code section 54-2050(1)(a)
25 which requires that a real estate brokerage representation agreement be in writing;
3. Whether, under the facts, Petitioner violated Idaho Code section 54-2053 which
requires that all advertising of property contain the broker's licensed business name;

4. Whether, under the facts, Petitioner violated Idaho Code section 54-2054(9) which requires all fees to be paid through a broker for the performance of acts requiring a real estate license—this is the crux of Respondent's case and Respondent has simply and consistently failed to understand or accept that accepting a fee for advertising a property is not an act that requires a real estate license.
5. Whether, under the facts, Petitioner violated Idaho Code Section 54-2060(2) which prohibits a flagrant course of misrepresentation and prohibits making false promises;
6. Whether, under the facts, Petitioner violated Idaho Code Section 54-2054(9), which only requires fees for acts that require a real estate license to be paid through a broker;
7. Whether, under the facts taken as a whole, Petitioner violated the standard of care as set forth in Idaho Code Section 54-2060(12) or violated Section 54-2060(11)—dishonest or dishonorable dealings.
8. Whether, under the facts and circumstances of this case, Respondent has overreacted and exceeded the sanctions, if any, that would normally be appropriate.
9. Whether Respondent's failure to produce a transcript of the hearing on November 5, 2008, and/or make such transcript available to Petitioner violates any statutory procedural requirements or due process principles. Petitioner presented facts in direct contradiction to the facts presented by Respondent at the Hearing, and the Hearing Officer did not address or acknowledge those facts in her initial decision—which was adopted in its entirety by Respondent in its Final Order—Respondent did not even have the transcript of the hearing available for its so called "independent review".

1 10. Whether the use of a private attorney was appropriate and/or necessary by
2 Respondent who now seeks to have Petitioner be liable for its attorney fees.

3 DATED this 15 day of April 2009.

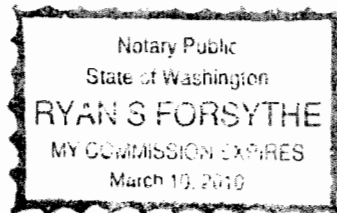
4
5 Michael Scott MacLay
6 **MICHAEL SCOTT MACLAY,**
7 **PETITIONER**
8 3304 N. Park Road
9 Spokane Valley, WA 99212

10 State of Washington)
11)
12 County of Spokane)

13 I, **MICHAEL SCOTT MACLAY**, am the Petitioner in the above entitled Petition for Judicial Review. All
14 statements in the Petition for Judicial Review are true and correct to the best of my knowledge and belief.
15 Dated this 15 day of April 2009.

16 Michael Scott MacLay
17 **MICHAEL SCOTT MACLAY**

18 Subscribed and Sworn to before me this 15th day of April 2009.



[Signature]
Notary Public in the State of Washington
Residing in Spokane
Commission Expires: 3/19/2010

APR 20 2009
J. L. ANDERSON, CLERK
By: *[Signature]*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Petitioner,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent.

Case No. CVOC0907296

ORDER GOVERNING
JUDICIAL REVIEW

Petition for Judicial Review having been filed herein, and it appearing that the issues presented on appeal are questions of law and fact; and it further appearing that a record/transcript is necessary to process this appeal:

It is ORDERED:

1) That upon completion of the record the agency shall mail or deliver a notice of lodging of transcript and record to all attorneys of record or parties appearing in person and to the district court.

2) That the notice shall inform the parties before the agency that they pick up a copy of the transcript and record at the agency and that the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the agency any objections, and the notice will further advise the petitioner to pay the balance of the fees for preparation before the transcript and record will be delivered to the petitioner.

3) That the Agency shall transmit the settled transcript and record to the district court within forty-two (42) days of the service of the petition for judicial review.

4) That the Agency, upon filing with the Court the record, shall send notice of such filing to all parties;

5) That the Petitioner's brief shall be filed and served within thirty-five (35) days of the date the transcript and record are filed with the Court.

6) That the Respondent's brief shall be filed and served within twenty-eight (28) days after service of Petitioner's brief.

7) That Petitioner's reply brief, if any, shall be filed and served within twenty-one (21) days after service of Respondent's brief.

8) That either party may notice the matter for oral argument after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so notice for oral argument, the Court will deem oral argument waived and decide the case on the briefs and the record.

Dated this 28th day of April, 2009.



KATHRYN STICKLEN
Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of April, 2009, I mailed (served) a true and correct copy of the within instrument to:

KIRTLAN G. NAYLOR
NAYLOR & HALES, PC
950 W BANNOCK, STE 610
BOISE, ID 83702

MICHAEL SCOTT MACLAY
PETITIONER (PROSE)
3304 N. PARK ROAD
SPOKANE VALLEY, WA 99212

J. DAVID NAVARRO
Clerk of the District Court

By: _____


Deputy Court Clerk

Kirtlan G. Naylor [ISB No. 3569]
NAYLOR & HALES, P.C.
Attorneys at Law
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone No. (208) 383-9511
Facsimile No. (208) 383-9516

Attorneys for Respondent

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MICHAEL SCOTT MACLAY,

Petitioner,

vs.

**IDAHO STATE REAL ESTATE
COMMISSION,**

Respondent.

Case No. CV-OC-2009-07296

**REPORT ON BANKRUPTCY AND
MOTION TO DISMISS PETITIONER'S
PETITION FOR JUDICIAL REVIEW**

Respondent, by and through its attorneys of record, Naylor & Hales, P.C., gives notice to the Court that certain documents filed by the United States Bankruptcy Court for the Eastern District of Washington (*In Re Michael Scott Maclay*, Case No. 09-02717-PCW), related to Petitioner's pleadings for a finding of indigency are attached hereto as Exhibits "A" and "B." Respondent requests the Court take judicial notice of these court filings, and in consideration of the fact that Petitioner's bankruptcy has been dismissed, reconsider this Court's finding of indigency.

Should the Petitioner fail to now pay the Court reporting fees for the transcript lodged with the Agency, Respondent requests that this Court dismiss the Petition for Judicial Review for

**REPORT ON BANKRUPTCY AND MOTION TO DISMISS
RESPONDENT'S PETITION FOR JUDICIAL REVIEW - 1.**

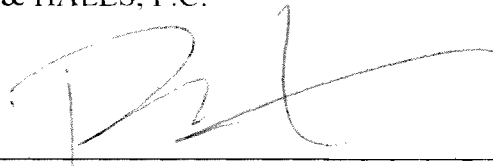
failure to prosecute pursuant to I.R.C.P. 84(n). Rule 84(n) provides that when a party fails to timely take any step in the proceedings, it may be grounds for a sanction, including a dismissal of the petition for judicial review.

No oral argument is requested.

Respectfully submitted this 5th day of October, 2009.

NAYLOR & HALES, P.C.

By



Kirtlan G. Naylor, Of the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2009, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Michael S. Maclay
3304 N. Park Road
Spokane Valley, WA 99212
Petitioner

☒ U.S. Mail
☐ Hand Delivered
☐ Federal Express
☐ Fax Transmission

Kimberly A. Coster
Deputy Attorney General
Idaho Real Estate Commission
633 N. 4th Street
P.O. Box 83720
Boise, ID 83720-0077

☒ U.S. Mail
☐ Hand Delivered
☐ E-Mail: kim.coster@irec.idaho.gov
☐ Fax Transmission
334-2050



Kirtlan G. Naylor

MAIREC Maclay, Michael 'Scott' Judicial Review Case\7449_05 Report on BK, Motion to Dismiss Petition for Judicial Review.wpd

**REPORT ON BANKRUPTCY AND MOTION TO DISMISS
RESPONDENT'S PETITION FOR JUDICIAL REVIEW - 2.**

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re

Michael Scott Maclay

Case Number **09-02717-PCW**

Chapter **13**

ORDER OF DISMISSAL

Debtor(s)

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on September 29, 2009 on the confirmation of the Chapter 13 Plan. Debtor's counsel made an Oral Motion to Dismiss the Chapter 13 Case. The Court reviewed the files and records herein, and was fully advised in the premises.

IT IS HEREBY ORDERED as follows:

1. The debtor's counsel, Elizabeth Heath, made an oral Motion to Dismiss the case.
2. The Motion to Dismiss is GRANTED and the above-referenced Chapter 13 case is hereby DISMISSED.



Patricia C. Williams

Patricia C. Williams
Bankruptcy Judge

09/30/2009 11:32:47

ORDER OF DISMISSAL

00015
EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

Michael Scott Maclay
(Debtor)

Case Number: **09-02717-PCW13**

Chapter: **13**

NOTICE OF DISMISSAL

NOTICE IS HEREBY GIVEN that an Order Dismissing the above-entitled case was signed on **September 30, 2009** and entered on the case docket on **September 30, 2009**.

Date: September 30, 2009

CLERK OF COURT

/s/ Nydia Urlacher

Deputy Clerk

00016
EXHIBIT B

ORIGINAL

FILED

330

NOV 17 2009

Clerk of District Court
Spokane, WA

Michael Scott Maclay
 Petitioner (Pro Se)
 3304 N. Park Road
 Spokane Valley, WA 99212
 (509) 714-7974

**IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

Michael Scott Maclay,

Petitioner

vs.

Idaho Real Estate Commission,

Respondent

Case No. CVOC0907296

PETITIONER'S BRIEF IN SUPPORT OF
 PETITION FOR JUDICIAL REVIEW

Petitioner, MICHAEL SCOTT MACLAY, presents the following memorandum of points and authorities in support of his Petition for Judicial Review. Petitioner also requests that a date and time be set by this Court for oral arguments on this matter.

INTRODUCTION: STATEMENT OF ISSUES FOR JUDICIAL REVIEW

Hundreds of years ago, the term "witch hunt" arose from the Salem Witch Trials to describe an overzealous pursuit of a perceived wrongdoer, with a frequent and fairly callous disregard for facts supporting a person's innocence. In the 1950's, during the McCarthy era, many lives were ruined on accusations alone. Sadly, it is human nature to draw inferences from an initial "perception" of facts, and then, once conclusions are reached, the search becomes one of focusing on those facts that support the conclusion and conveniently ignoring those that do not. We have all been victims of this kind of persecution at one time or another in our lives. Our legal system is supposed to

Petitioner's Brief Supporting Judicial Review - 1

00017

1 investigate and consider facts dispassionately. Rather than duels and other "tit for tat"
2 means of resolving disputes, we turn to impartial tribunals to settle differences. With
3 hope and optimism, Petitioner looks to this Court to finally and fully review the agency
4 record—including Petitioner's testimony in his deposition and at the hearing, as well as
5 Petitioner's exhibits, (Marked in the Agency Record as A-G). If all the evidence is taken
6 into consideration, it will be clear that Petitioner was at all times acting in good faith with
7 a determined effort to abide by the rules—no matter how gray some of them are—and
8 to provide a valuable and desired marketing service to Idaho citizens. There certainly is
9 no pattern of misconduct, dishonesty, recklessness, or deceit. Petitioner came to Idaho,
10 wanting to use the same marketing program that he had been using for years in
11 Washington. He was open and upfront about this, and initially his broker, John Runkle,
12 was in agreement. Mr. Runkle's name as broker, and his signature, appears on virtually
13 every Seller's Representation Agreement that contained a flat fee for marketing
14 arrangement. Mr. Runkle even sent his Idaho agents to Washington to work for the real
15 estate company, Family First, that also employed Petitioner. Jerry Webb, the Family
16 First Broker, clearly states this in his letter to the Idaho Real Estate Commission,
17 ("Commission"), (Respondent's Exhibit 1). Curiously, the Commission chose not to
18 pursue a deposition or any other means of verifying Mr. Webb's letter.

15 It is fair to say that "but for" the so called verified complaint of John Runkle and
16 his struggle with Petitioner's flat fee marketing program, the Commission would not
17 have pursued its case with such intensity. The Administrative Hearing Officer did not
18 give any weight to Mr. Webb's letter, or the letter of attorney and Idaho broker, George
19 Kucera (Petitioner's Exhibit "A"), or the inconsistency of Mr. Runkle's statement that he
20 did not learn of the flat fee marketing program until September of 2006, when the facts
21 clearly show that he, or his authorized representative, Steve Ayles, was signing the
22 Seller Representation Agreements that included up front flat fee marketing fees as
23 broker, (See Respondent's Exhibits 4, 5, and 6). Only the Smith Seller Representation
24 Agreement, (Respondent's Exhibit 3) was not signed by Mr. Runkle. The Smith
25 Agreement was executed through Real Team in Washington and there is no evidence
26 that Petitioner received any marketing fee from this Agreement. Petitioner was not
27 involved with this Agreement. The Agreements shown as Exhibits 4, 5, and 6, were all

1 entered into prior to September of 2006. So how could Mr. Runkle honestly say he did
2 not know about Petitioner's upfront flat fee marketing program before then? Doesn't
3 this weaken Mr. Runkle's credibility? Yet, incredibly, the Hearing Officer failed to
4 address these facts in her Findings of Fact. If a person considers something but then
5 chooses to disregard it in reaching a conclusion, would not logic dictate that he or she at
6 least address the question of why these facts were not persuasive?

7 In his deposition, Mr. Runkle, (pgs 25-29 of Runkle's deposition) essentially says
8 that he does not know what he was signing, when answering the question of whether he
9 knew about the upfront marketing fees charged by Petitioner before September 2006.
10 What kind of responsible broker would admit that he just signed whatever crossed his
11 desk?

12 In his letter to Scott Maclay dated March 1, 2006, (Petitioner's Exhibit A), Idaho
13 Broker and attorney, George Kucera, gives a sensible definition and distinction between
14 marketing fees that are not related to the performance of any act requiring a real estate
15 license in the State of Idaho and the "completion" of acts requiring a real estate license.
16 Here you have a broker who is perfectly willing, as many brokers in Washington are and
17 were, to allow an agent to charge a marketing fee for non real estate agent acts without
18 running this fee through the brokerage. Simply noting the fee on the Listing Agreement
19 was acceptable to this Idaho broker. Even Mr. Morse, the Commission's investigator
20 says that there is a gray area (Transcript pages 119-120) between up front marketing
21 fees paid to the agent who is providing the marketing and then further real estate
22 licensee acts the compensation for which must go through the brokerage. When you
23 have a gray area of the law, and particularly when you have confusion amongst brokers
24 with one accepting it and one not accepting it, and you have a practice that has been
25 successfully doing it in another state for many years, and when you are up front and
26 open about it, how can an unbiased evaluator of facts conclude that Petitioner was
27 acting recklessly or engaging in a pattern of deceit and misconduct?

28 Petitioner tried to point out these relevant facts and grayness of the law both at
29 the Administrative Hearing (see Transcript of Petitioner's opening statement and
30 Petitioner's Brief Supporting Judicial Review - 3

1 exhibits) and through his retained counsel's Memorandum in Support of a Motion for
2 Reconsideration (Item #7 on the Index of Agency Record), yet without addressing any
3 specifics, the Hearing Officer simply states "all arguments set forth in the Memorandum
4 were already considered in the Findings of Fact, Conclusions of Law and
5 Recommended Order." (Item 9 of Agency Record, pg.1). A careful review of the
6 Findings of Fact, Conclusions of Law and Recommended Order shows that the Hearing
7 Officer failed to address specifically any of Petitioner's exhibits including the letter from
8 George Kucera, the inconsistency between Jerry Webb's letter (Respondent's Exhibit
9 1), the facts showing Mr. Runkle's awareness and approval of the upfront marketing
10 fees being paid directly to Petitioner prior to September 2006.

11 In its Final Order, the Commission adopted the Hearing Officer's Findings in their
12 entirety. Petitioner intends to address the other conclusions by the Hearing Officer
13 below, but it is critical to a fair review of this case, that the Hearing Officer's glaring
14 omission of the facts supporting Petitioner's good faith activities related to the marketing
15 fees be corrected. At a minimum this case should be remanded with instructions to the
16 Hearing Officer to state why she was not troubled by Mr. Runkle's signature on the
17 Listing Agreements, prior to September 2006, or why she gave no probative value to the
18 letters of Jerry Webb and/or George Kucera concerning the issue of the upfront
19 marketing fees paid to Petitioner.

20 It is also a regrettable and curious omission for the Hearing Officer to fail to
21 address the exhibits presented by Petitioner of his correspondence with Help-U-Sell
22 (Petitioner's Exhibits B, E, and F) following the death of George Kucera in which he
23 believed that he was waiting for Help-U-Sell to transfer the Idaho franchise to him.
24 During the period in question, October 31, 2007 through December of 2007, it appears
25 that at least one individual in Help-U-Sells Corporate office, Erik Mower, was dealing
26 with Petitioner on the level of telling him to be patient because "some files that
27 unfortunately were not transferred over to us". Certainly, it shows that Petitioner was
being led, in good faith, to believe that the transfer of the Help-U-Sell franchise in Idaho
from George Kucera was "in the works".

**FLAT FEE MARKETING FEES ARE NOT REQUIRED
TO BE PAID THROUGH THE REAL ESTATE BROKER**

As stated in the Introduction, this is the crux of this whole case. Is John Runkle any different than George Kucera in terms of their status as Brokers in the State of Idaho. One Broker concludes that marketing fees must be paid through his firm and on the other does not. Both brokers, as well as Petitioner, agree that the marketing fees should be, and in this case, were disclosed to the Sellers on the Listing Agreement. Without giving regard to George Kucera's letter, John Runkle's tacit consent of the fees as evidenced by his signature on four of the five listing agreements, or even to the testimony of Don Morse—the Commission's own investigator—that this is a gray area of the law, the Hearing Officer erred in concluding on page 17 of the Findings of Fact, Conclusions of Law, and Recommended Order (#2 of Agency Record) that Petitioner had violated Idaho Code Section 54-2054 (9). Petitioner accepted a marketing fee, with the consent of his broker, John Runkle. Any other services as a real estate agent for the clients involved were to be paid—upon completion of a sale—by a commission that would have been paid through the brokerage. In addition, arguably, the marketing fee was paid through the brokerage (as Mr. Kucera suggests in his letter) with the simple fact that the broker had knowledge of the fee and it was disclosed in the Listing Agreement. Instead of a violation of Idaho Real Estate law, really what you have here is a difference of opinion between a broker and his agent. Yes, the relationship probably needed to be severed, but it is a significant, unsupported stretch to go from there to a conclusion that the agent is violating Idaho real estate law and "engaging in a continued or flagrant course of misrepresentation or making false promises, " and engaging in dishonest or dishonorable dealings, reckless conduct, etc. as the Hearing Officer concludes. (Findings, pg 17).

Idaho Code 54-2054(9) is limited to fees for the "performance of any acts requiring a real estate license. No one suggests that only a person with a real estate license can "market" real property. Access to a multiple listing service is not something that by statute requires a real estate license. Instead, it is a rule engineered by brokers to establish and maintain a monopoly on who gets to broadly advertise homes for sale.

1 Access to a multiple listing service is limited to agents by the brokers who own the
2 service, not by the law of the State of Idaho that governs real estate agents. If
3 Petitioner wants to help citizens of the State of Idaho who do not want to pay what they
4 perceive are exorbitant commissions by using his status as an agent to get them access
5 to the multiple listing, then he is really doing nothing more than opening a marketing
6 door to them that an exclusive club had previously kept closed. Think about it, there is
7 no salesmanship involved in entering data into a computer so that a home may be
8 marketed. It is no different than advertising in a newspaper or at the corner convenient
9 store. Sellers recognize that greater exposure leads to more interest, and a multiple
10 listing service obviously generally generates more notice of the sale than does a sign on
11 the property. Realtor fees are customarily not paid until and unless there is a
12 completion of a sale (a closing), and then they are paid for the services that a realtor
13 provided in bringing a buyer and seller together. It is the art of negotiating and the work
14 of follow through, with lenders, other agents, loan payoffs, etc, that makes up the
15 essence of what a realtor does and how he or she can justify a commission based fee.
16 Simply posting notice that a property is for sale—again whether through a sign in the
17 yard, an advertisement in the paper, or a description in a multiple listing service—
18 requires no special skill or training and thus is not something that does or should require
19 a real estate license. To wrongly apply the law governing fees for acts that do, by law
20 require a real estate license, to a marketing program that is designed to help Idaho
21 citizens keep the cost of selling their homes as low as possible essentially denies a
22 choice to Idaho residents who are willing to accept greater responsibility for selling their
23 own homes.

19 As for the other conclusions regarding conduct not involving a flat fee marketing
20 program, Petitioner has had counsel prepare briefs (Brief in Support of Motion for
21 Taking Exception to Recommended Order—Item 14 on the Index of Agency Record, and
22 Memorandum in Support of Motion for Reconsideration—Item 8 on the Index of Agency
23 Record) that were carefully prepared and presented an alternate picture of a person
24 who substantially complied with Idaho Real Estate Law while at the same time tried to
25 maintain a business following the death of its broker and earnestly worked with the both
26 the Idaho Real Estate Commission and the national headquarters of Help-U-Sell to

25 Petitioner's Brief Supporting Judicial Review - 6

1 facilitate a transfer of ownership of a franchise for a very short period of time (October
2 31, 2007 to December 5, 2007—just over a month). During that time there were two
3 listing for two properties for one person, Aaron Krivor, in which a listing agreement was
4 executed not by Petitioner at the end of October 2007 and then activated in early
5 December. There simply is no evidence that Petitioner took any action with regard to
6 this one customer between October 31, 2007, the end of his association with George
7 Kucera and December 5, 2009, when his association with Treaty Rock began. Given
8 these facts, which were startlingly ignored by the Hearing Officer and the Commission in
9 its Final Order. Most significant is the fact that Petitioner's signature does not appear
10 on either the listing agreements for Aaron Krivor.

9 Like in a witch hunt, facts that do not support a pre-conceived conclusion are
10 simply ignored. Another example of this is the findings and conclusions reached with
11 regard to the Treaty Rock Realty Listings Advertised on the Help-U-Sell Website.
12 Treaty Rock's broker, Kirby Swanson, only became alarmed about any so called cross
13 marketing after Don Morse—the Commission's investigator told her that he believed the
14 description of Treaty Rock listings on the Help-U-Sell website were improper. (Kirby
15 Swanson Deposition pg. 17—part of Item 0 in the Index of Agency Record). He
16 basically threatened Ms. Swanson into taking action that she might not otherwise have
17 taken. The Help-U-Sell website was for Petitioner's Washington franchise and the
18 descriptions are not misleading in that Treaty Rock is used for the Idaho listings. Both
19 listings just happen to be on a website that Petitioner used for both Washington and
20 Idaho. Respondent acknowledges, in its brief titled "Petitioner's Support of the Findings
21 of Fact and Conclusions of Law" on page 4 (Item 11 on the Index of Agency Record)
22 that the concept of cross marketing properties may be utilized, but supports this with a
23 statement that has no legal backing "this occurs only where the brokerages are licensed
24 in Idaho..." Here you have a situation where one brokerage was properly identified as
25 being licensed in Washington (Help-U-Sell) and one in Idaho (Treaty Rock).
26 Essentially, this kind of advertising is to let people know that a person has two different
27 associations and listings, one in Washington and one in Idaho. It is not anymore
misleading to the public, than cross marketing is in general. Certainly, alone, it does not
give rise to a revocation of a real estate license. In fact none of this does.

CONCLUSION

The Hearing Officer takes a few isolated facts to support her Conclusions and frankly ignores verifiable facts that lead to a different conclusion. At a minimum, this case should be remanded with instructions for the Hearing Officer and the Commission to address the facts and law supporting Petitioner. By address, Petitioner means state why they are or are not important in arriving at the conclusions drawn. The impartial observer would very much wonder why John Runkle would complain about an act that he gave tacit endorsement of by signing his name to the Listing Agreements. The impartial observer (Idaho citizen) would wonder why he or she cannot pay a flat fee to a realtor to help market the sale of his or her property, without being required to accept the full menu of agent services. An Idaho citizen should have the right to participate as much or as little as he or she wants in the sale of his or her home. With flat fee marketing, a home seller gets exposure to the market, but still retains the authority and ability to handle the negotiation of the sale of his or her own home. Idaho real estate law requiring an agent to be paid through his or her broker is limited to compensation earned for services that require a real estate agent license. Advertising a home for sale does not require a real estate license. If this position is accepted by this Court, then the missionary zeal of the Commission in its effort to string together innuendo and non-related, non-reoccurring facts about the character and behavior of Petitioner to "cleanse" Idaho real estate of a so called "bad" seed reveals itself for the false front that it truly is. The Commission has undertaken a mountainous effort just to be "right" including the almost unfathomable amount of attorney fees and costs it has tolerated. "Much to do about nothing" is a very appropriate and fitting ending. Please break the spell that has kept everyone unfairly and irrationally focused on persecuting Petitioner

Respectfully submitted this 13 day of November 2009.

Michael Scott MacLay
MICHAEL SCOTT MACLAY,
PETITIONER
3304 N. Park Road
Spokane Valley, WA 99212

Kirtlan G. Naylor [ISB No. 3569]
NAYLOR & HALES, P.C.
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Attorneys for Respondent

NO. _____ FILED _____
A.M. _____ P.M. **4:21**

NOV 23 2009

J. DAVID NAVARRO, Clerk
By CARLY LATIMORE
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MICHAEL SCOTT MACLAY,

Petitioner,

vs.

**IDAHO STATE REAL ESTATE
COMMISSION,**

Respondent.

Case No. CV-OC-2009-07296

**RESPONDENT'S MOTION
TO DISMISS**

Respondent, Idaho Real Estate Commission, by and through its attorneys of record, Naylor & Hales, P.C., moves this Court, pursuant to I.R.C.P. 84(n) and (o), for its order striking Petitioner's Brief in Support of Petition for Judicial Review and dismissing this matter.

This Court, in its Order Governing Judicial Review filed April 28, 2009, ordered that "The Petitioner's brief shall be filed and served within 35 days of the date the transcript and record are filed with the Court." The Notice of Lodging of Agency Record-Proceedings Not Transcribed was filed with the Court on May 7, 2009, and the Notice of Lodging of Transcript was filed with the

RESPONDENT'S MOTION TO DISMISS - 1.

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Court on October 7, 2009. Therefore, pursuant to the Court's order, and using the latest filing date of the lodging of documents, 35 days from October 7, 2009, would be November 12, 2009.¹

Given the fact that Petitioner's Brief in Support of Petition for Judicial Review was filed on November 13, 2009, the brief is untimely and must be stricken and the case dismissed. The Court's order is mandatory, and relies on the filing date with the Court, not service date to the parties.

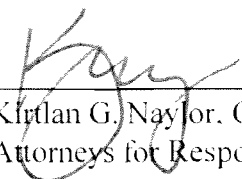
Pursuant to I.R.C.P. 84(n), the failure of a party to timely take any steps in the process for judicial review, while not deemed jurisdictional, may be grounds for appropriate sanctions, which may include dismissal of a petition for judicial review.

No request for additional time was received prior to the deadline, and while Petitioner is acting as *pro se* counsel, *pro se* litigants are held to all standards of attorneys. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (*pro se* litigants are held to the same procedural rules as counseled litigants).

Therefore, it is respectfully submitted that Petitioner's case before this Court on administrative review by the District Court be dismissed. No oral argument is requested.

Respectfully submitted this 23rd day of November, 2009.

NAYLOR & HALES, P.C.

By _____
Kirtlan G. Naylor, Of the Firm
Attorneys for Respondent

¹The 35th day was actually November 11, 2009; however, pursuant to Rule 6, I.R.C.P., since that date was Veterans Day, a legal holiday, the deadline falls to the next court date.

CERTIFICATE OF SERVICE

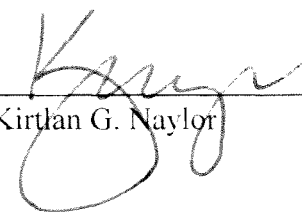
I HEREBY CERTIFY that on the 23rd day of November, 2009, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Michael S. Maclay
3304 N. Park Road
Spokane Valley, WA 99212
Petitioner

☒ U.S. Mail
☐ Hand Delivered
☐ Federal Express
☐ Fax Transmission

Kimberly A. Coster
Deputy Attorney General
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☐ Fax Transmission
334-2050



Kirtlan G. Naylor

MI-IREC Maclay, Michael 'Scott' Judicial Review Case 7449_07 Motion to Dismiss.wpd

JAN 27 2011
J. C. [Signature] CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Plaintiff,

vs.

IDAHO STATE REAL ESTATE
COMMISSION,

Defendant.

Case No. CV-OC0907296

MEMORANDUM DECISION
AND ORDER

This case came before the Court on Respondent Idaho Real Estate Commission's (the Commission's) motions to dismiss and motion to stay. The Court, having determined that no hearing is necessary, will deny the motion to dismiss and grant the motion to stay.

I. Motion to Dismiss

The Commission asserts that this judicial review should be dismissed with prejudice because the Petitioner's opening brief was filed one day late. The Commission relies on Rule 84(n), I.R.C.P. The Petitioner, Michael Scott MaClay (MaClay) objects to the motion, citing *Aho v. Idaho Transportation Department*, 145 Idaho 192, 177 P.3d 406 (Ct. App. 2008).

The Court, having reviewed *Aho* and having reviewed the procedural history of this case, denies the motion to dismiss. Under Rule 84(n), the Court may impose a sanction up to and including dismissal with prejudice. However, there is a preference for decision on the merits: dismissal is a drastic sanction for failure to comply with time limits. There is no prejudice shown to the Commission. Therefore, the motion to dismiss is denied.

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IT IS SO ORDERED.

Kathryn A. Sticklen
Kathryn A. Sticklen
District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

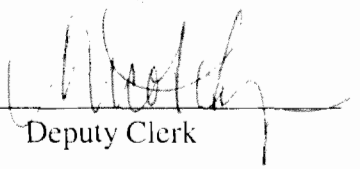
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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 1/23/10

By 
Deputy Clerk

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Attorneys for Respondent

FILED
A.M. P.M. 414

FEB 23 2010

J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

MICHAEL SCOTT MACLAY,

Petitioner,

vs.

**IDAHO STATE REAL ESTATE
COMMISSION,**

Respondent.

Case No. CV-OC-2009-07296

**RESPONDENT IDAHO REAL ESTATE
COMMISSION'S REPLY BRIEF TO
PETITIONER'S PETITION FOR
JUDICIAL REVIEW**

Respondent, Idaho Real Estate Commission, by and through its attorneys of record, Naylor & Hales, P.C., files this brief in support of the Final Order issued by the Idaho Real Estate Commission ("Agency") on March 19, 2009, wherein the Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order") of the Hearing Officer was adopted.

Standard of Review

An agency's factual determination need only be based on substantial and competent evidence—evidence defined by the Idaho Supreme Court as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Dehlbom v. State, Indus. Special Indem. Fund*, 129

RESPONDENT'S REPLY BRIEF - 1.

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Idaho 579, 582 (1997). This standard is "more than a scintilla of proof, but less than a preponderance." *Matter of Wilson*, 128 Idaho 161, 164 (1996). "Substantial and competent evidence need not be contradicted, nor does it need to necessarily lead to a certain conclusion." *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 517 (2006). This standard holds true even though there is conflicting evidence in the record. *Soto v. Simplot*, 126 Idaho, 536, 539 (1994).

Idaho Code Section 67-5279 sets forth the statutory scope of review for the court in reviewing an agency's decision:

67-5279. SCOPE OF REVIEW -- TYPE OF RELIEF. (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(2) When the agency was not required by the provisions of this chapter or by other provisions of law to base its action exclusively on a record, the court shall affirm the agency action unless the court finds that the action was:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure; or
- (d) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Analysis

In the case before this Court on judicial review, the Court has the advantage of numerous pleadings and briefings occurring prior to and following the appointed Hearing Officer's Recommended Order, and the Final Order of the Agency.

In fact, Petitioner's Support for the Findings of Fact and Conclusions of Law (Clerk Record 0011), and Petitioner's Objection to Respondent's Motion for Taking Exception to Recommended Order filed January 22, 2009 (Clerk's Record 0025), sets forth significant responses to the arguments raised by Mr. Maclay both in the Agency proceeding below as well as in the District Court Petition for Review. The documents and the arguments set forth in the record below clearly support the standard for judicial review that the conclusions by the Hearing Officer and the Idaho Real Estate Commission are supported by the evidence such that a reasonable mind could accept and support those conclusions.

Before addressing any specific objections raised in the Petition for Judicial Review, it is important to note up front what is absent from the Petition for Judicial Review. Petitioner has not raised any allegation that the agency action was in violation of constitutional or statutory provisions; in excess of the statutory authority of the Agency; made upon unlawful procedure; or arbitrary, capricious, or an abuse of discretion as required by Idaho Code Section 67-5279. Further, Petitioner has failed to raise any reasonable argument that the Agency action prejudiced the substantial rights of the appellant. *Id.* Therefore, the Petition for Judicial Review before this Court must be dismissed, and the Agency's Final Order must be affirmed.

Petitioner's Substantive Argument¹

Much of Petitioner's Brief asserts that the Hearing Officer failed to give any weight to Petitioner's evidence; however, the Hearing Officer is not required to identify and address every piece of evidence and every testimony raised by the licensee, and declare that evidence not credible. Rather, the statutory standard for review on a petition for judicial review is to determine whether there is substantial and competent evidence to support the findings of fact and conclusions of law. This standard holds true even though there is conflicting evidence in the record. *Soto v. Simplot*, 126 Idaho 536, 539 (1994).

There was sufficient evidence in the record by John Runkle in his deposition testimony where he admitted that certain documents may have been signed by his authorized agent with listing agreements referencing flat fees involving Mr. Maclay, but Mr. Runkle explained that no flat fee was ever paid through the brokerage to Mr. Maclay pursuant to those agreements. Therefore, even if Mr. Maclay had erroneously believed Mr. Runkle authorized him to engage in flat fee agreements, the brokerage never was asked to, nor in fact did, pay Mr. Maclay any flat fee payment through the brokerage. (Runkle Depo., pp. 25-29.) Mr. Runkle testified in his deposition that he, or his agent, Mr. Ayles, may have not comprehended the significance of the seller representation agreements entered into by Mr. Maclay involving the flat fee arrangement. Nonetheless, the Hearing Officer properly found sufficient evidence to find the existence of the flat fee marketing program without paying money through the brokerage, and which failed to maintain

¹Respondent sees no purpose in responding to Petitioner's diatribe of an alleged "witch hunt" and the historical review of the Salem witch trials. Mr. Maclay was afforded every due process afforded by the applicable rules and statutes governing the underlying proceeding, and exercised those rights by attending the administrative hearing, and filing numerous written objections and pleadings subsequent to the hearing related to the substantive issues raised by the hearing.

the required documentation for the brokerage by his various listings. The Hearing Officer's Recommended Order (pp. 4-9) recognized that Mr. Runkle and/or Mr. Ayles signed the seller representation agreements, and had sufficient evidence from Mr. Runkle's explanation as to why the practice was still not authorized by the brokerage. There was no question that failing to have these marketing fees paid through the brokerage was a violation of license law.

Petitioner next argues that the flat fee marketing fees are not required to be paid through the real estate broker. While it is true that simply advertising properties for sale, such as in a newspaper or on a for sale by owner website, are services not requiring a real estate license, Mr. Maclay's conduct as testified to by himself was not limited to simply advertising properties. He accepted a fee for the performance of acts requiring a real estate license, including taking telephone calls in response to "for sale" signs, negotiating sales, providing comparative market analyses, taking pictures of the listing, placing yard signs, placing the listings on the multiple listing service (which requires a real estate license), and responding to contacts by interested buyers. (Maclay Depo., pp. 35-37.) These acts all require a real estate license, and so any fees received in the performance of these acts must be paid through the broker. There was sufficient evidence for the Hearing Officer to make her Recommended Order, and upon which the Agency to adopt.

Mr. Maclay argues that the Multiple Listings Service is nothing more than "an exclusive club" for the marketing of real estate, which he did not believe should be kept closed. However, a requirement by the Multiple Listings Service is that participants be licensees in the state of Idaho. Nonetheless, there was ample evidence to establish that Mr. Maclay did much more than simply list these properties.

Further, the only evidence in the record dealing with Eric Mower, from Help-U-Sell, is Exhibits E and F to the hearing, and neither deal with Mr. Maclay's attempt to transfer the Help-U-Sell franchise from the deceased George Kucera to Mr. Maclay. However, there was clear evidence from Janet Ladd's hearing testimony (transcript, pp. 161-176), the Help-U-Sell representative, indicating that she had communicated to Mr. Maclay what was required for the transfer of a franchise following Mr. Kucera's death. At no time did she make the representation to Mr. Maclay that any transfer of the franchise had occurred and, in fact, he was served with letters to cease and desist from using the Help-U-Sell franchise information.

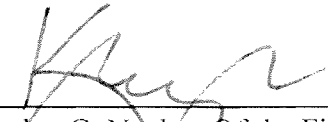
Mr. Maclay continued to list Idaho properties on the Help-U-Sell website long after Mr. Kucera's death in October, and even after December 5, 2007, when he was under the Treaty Rock Realty brokerage. The Krivor listing agreements were entered into on October 29, 2007, at a time when Mr. Maclay was not under a proper Idaho broker. Mr. Kucera died in early October 2007, and neither Robbie Canfield nor Kirbi Swanson were his broker for the period of time October 29, 2007 through December 29, 2007, when Kirbi Swanson was the broker for Treaty Rock Realty for Mr. Maclay. Therefore, he acted without an Idaho licensed broker.

Conclusion

The Hearing Officer, and the Idaho Real Estate Commission ("Agency"), had sufficient substantial and competent evidence that a reasonable mind might accept as adequate to support a conclusion as to all claims and as to all Findings of Fact and Conclusions of Law adopted in the Recommended Order. The Petition for Judicial Review must be denied and the Final Order of the Agency must be affirmed.

Respectfully submitted this 25th day of February, 2010.

NAYLOR & HALES, P.C.

By 
Kirtlan G. Naylor, Of the Firm
Attorneys for Respondent

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 25th day of February, 2010, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Michael S. Maclay
3304 N. Park Road
Spokane Valley, WA 99212
Petitioner

☒ U.S. Mail
☐ Hand Delivered
☐ Federal Express
☐ Fax Transmission

Kimberly A. Coster
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☐ Fax Transmission
334-2050


Kirtlan G. Naylor

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NO. _____
FILED 4:41
A.M. P.M.

MAR 18 2010

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

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2 Petitioner (Pro Se)
3 8304 N. Park Road
4 Spokane Valley, WA 99212
5 (509) 714-7974

7 **IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT**
8 **OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

9 Michael Scott Maclay,

10 Petitioner

11 vs.

12 Idaho Real Estate Commission,

13 Respondent

Case No. CVOC0907296

PETITIONER'S REPLY TO
RESPONDENT'S RESPONSE BRIEF

14 Petitioner, MICHAEL SCOTT MACLAY, submits this reply to Respondent's Reply
15 Brief. Petitioner also, respectfully, requests a hearing in this matter.

16 Respondent begins its Reply Brief by minimizing the standard of review and in
17 the process accentuates the lack of substantial facts to support the Final Order.
18 Although a "preponderance of the evidence" may not be required, without its sensible
19 guidance, how can any fact be properly distinguished from opinion? "Evidence that a
20 reasonable mind might accept as adequate to support a conclusion" is the same kind of
21 standard that Joseph McCarthy used in the 1950's... full of vague considerations and
22 ripe for preconceived opinions to construct into prevailing facts.

23 Petitioner's intention in this pleading is to present the core key points to consider
24 in evaluating this case that are clearly lacking in serving as a basis for revocation of his
25 license. And, as Petitioner's livelihood and reputation are at stake, and he has been
26 pummeled by the Respondent in its effort to prevail, including; publishing the

27 Petitioner Reply to Response Brief - 1

28 00038

1 Commission's decision in the Agency's newspaper without any mention of an appeal
2 (while expending an incomprehensible amount of time and energy and money on what
3 is clearly a lack of procedures and policies as it relates to this case) is also wrong.

4 Simple, substantial evidence exists in this record to completely support
5 Petitioner. Taking away a license to sell real estate in Idaho is clearly unwarranted and
6 retaliatory for having the pure audacity to stand for what is clearly right, and minus any
7 policy or procedure from the commission to the contrary, and, hopefully, resulting in the
8 best interests of the consumer and the entire community. At a minimum, this case
9 should be remanded and the Hearings Officer ordered to give specific reasons as to
10 why the facts supporting Petitioner and his contention that flat fee marketing is legal are
11 not, in and of themselves, "evidence that a reasonable mind might accept as adequate
12 to support a conclusion the Petitioner was simply and openly navigating, with his
13 broker's knowledge and consent, through a very gray area of real estate law. The
14 Hearing Officer adopted Respondent's opinion that there was a pattern of misconduct
15 warranting the severest sanction in license revocation without ever addressing a single
16 actual fact supporting a contrary conclusion - none. This outcome is patently unfair and
17 underscores partiality.

18 There is not just conflicting evidence in the record. Instead, there is a complete,
19 arbitrary, and utter disregard for important facts that show that the responsible broker,
20 John Runkle, knew and tacitly approved of Petitioner's flat fee marketing program—
21 Runkle or his agent signed all of the listing agreements and the letter from Petitioner's
22 Washington broker (a part of Respondent's exhibits) that credibly supports Petitioner's
23 contention that the very basis of his relationship with Runkle and my mission to bring
24 this marketing program to Idaho. Additionally, in a clear abuse of discretion, the
25 Administrative Hearing Officer failed to give any weight to the evidence, such as the
26 March 1, 2006, letter from attorney and real estate broker, George Kucera, stating that
27 flat fee marketing was not an act or service that required a real estate license or that the
28 fees must go through a broker's account. Respondent's own investigator acknowledged
that this was a gray area—yet Petitioner is supposed to have his licensed revoked?
Petitioner performed other services as a real estate agent, for which he was required to

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1 be licensed (with any commission to paid through the broker for any act requiring a
2 license without any violation or complaint), but it was clearly understood that the flat fee
3 was solely for marketing the property through the media such as on a website.

4 The whole scenario smells of arbitrariness and capriciousness. Petitioner has
5 been open and forthright about this practice from the very beginning and has, in fact,
6 continued to do so for nearly seventeen years. Instead of working with Petitioner to
7 develop more clear policies and procedures, Respondent overwhelmed Petitioner with
8 questionable means and pre-ordained conclusions, just like McCarthy and his so called
9 righteous crusaders. From the length of the investigation, to the time and money spent
10 on investigators and attorneys, to the heavy handed way in which the investigator dealt
11 with Kirby Swanson to the solicitation of complaints against Respondent, to the surreal
12 unfair atmosphere of the Hearing where members of the Idaho Real Estate Commission
13 solemnly observed and participated like regal ultimate authorities posing as working in
14 the public's best interests—how could Petitioner possibly have stood a fair chance?
15 Remember, the Commission is composed of realtors who have a vested profit interest
16 in controlling access to the multiple listing service.

17 A recap of the most salient and significant facts supporting Petitioner and his
18 assertion that substantial evidence exists to show the Hearing Officer's decision was
19 arbitrary and capricious are as follows:

20 1. That it is understood that both John Runkle & Steve Ayles (RealTeam) and Jerry
21 Webb (Family First Real Estate Group) were working through Petitioner towards
22 finalizing a merger of both companies while offering agents "flat affiliation fees"
23 (RealTeam) with the freedom to accept "flat marketing fees" (Family First Real Estate
24 Group). In fact, both offices had crossed-licensed agents in both states through their
25 respective companies and for this exact purpose. It was only after Runkle and Webb
26 terminated their negotiations that Petitioner joined Kucera and HelpUSell and for the
27 purpose of carrying on the business, and offering this business model, following
28 Kucera's terminal illness in both Idaho and Washington and expected death. Both
Runkle and Webb had a viable motive in participating in this "solicited" complaint for

Petitioner Reply to Response Brief - 3

1 their own economic benefit resulting in the removal of a viable competitor with proven
2 results superior to their own. This is the continuing basis of Petitioner's successful, third-
3 generation business, which is perfectly legal in every state including; Idaho.

4 2. The Commission continues to "paint" Petitioner as some rogue agent acting as a
5 broker without oversight. Runkle never issued any directive, nor has the Commission
6 produced, or presented, any evidence Petitioner was ever instructed to do anything
7 contrary to what Petitioner was doing. There is no Policy or Procedure in the RealTeam
8 Operation Manual to the contrary (as would be required by the Commission Policy and
9 Procedures Manual). Therefore, Runkle, as the responsible broker, is the only one who
10 violated the Commission's requirements. Petitioner's compliance as a "salesperson"
11 would not be optional to such a directive and it was simply never issued as it never
12 existed.

13 3. HelpUSell was, in fact, processing Petitioner's application for Kucera's franchise
14 as planed prior to Kucera's death (evidenced by letters from HelpUSell as contained in
15 Respondent's exhibits). HelpUSell never demanded the State of Idaho or Washington to
16 do anything to the contrary, and, in fact, recognized Petitioner as the Interim Broker and
17 later as the Responsible Broker in Washington without any objection. The fact that
18 some an unknowing and unauthorized secretary responded to a "solicited" request by
19 the Commission is suspect and probably inadmissible under the circumstances while
20 HelpUSell was in Chapter 7 and not able to process Petitioner's application. The fact
21 Petitioner was advertising Idaho listings (while with Treaty Rock in Idaho) on his
22 Washington HelpUSell website along with his Washington listings, and with the proper
23 "disclosures" for each and every listing related to the respective state of origin, is
24 perfectly acceptable and proper--there remains nothing in the Commission's Policy and
25 Procedures Manual to the contrary. It should be further noted that Petitioner did not
26 have access to Kucera's HelpUSell website immediately following his death... and that
27 the website was later granted to Petitioner when properly licensed.

28 Petitioner Reply to Response Brief - 4

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1 It is clear that the commission is targeting a business model which is not
2 forbidden in their policy and procedures manual written in the mid 1940's. The
3 Commission chose not to respond to Kucera or Runkle's inquiries. This activity is legal
4 in Washington and each and every state neighboring state to Idaho, and in Idaho, so
5 why not for Petitioner? The other "solicited" complaints do not rise to the threshold of
6 revocation of license and are "a lot to do about nothing." Any minor errors or omissions
7 as contained in the complaint are the responsibility of the responsible broker, Runkle,
8 and he alone is responsible for the Petitioner, the salesperson as outlined in the
9 Commission's Policy and Procedures Manual.

10 Petitioner has not endangered the public, committed any immoral act, converted
11 funds or even worked outside of the instruction of the responsible broker. Both, Kucera
12 and Runkle, as the responsible brokers, made every reasonable attempt to satisfy the
13 Commission's opinion of their own Rules and Procedures (or lack thereof), in advance,
14 and without any formal response from the Commission there is simply nothing in their
15 Rules and Procedures Manual to consider (and it is inconceivable that the
16 Commission's investigator, Mr. Morse, who only three months in the position as their
17 investigator, would state that he would have answered the question if asked and had
18 the authority to do so – and based on what non-existent policy or procedure?) Why
19 wouldn't Petitioner rely on the seasoned experience of George Kucera, a licensed real
20 estate attorney and broker also licensed in virtually each and every western state?
21 Minus any other solution from the Commission, why wouldn't Petitioner rely on the
22 policies and procedures of other Commissions of neighboring states to Idaho (where
23 Petitioner has also participated in establishing clear policies and procedures consistent
24 to Petitioner's activities here in Idaho), specifically; in Washington where Petitioner has
25 been successfully operating offering flat marketing fees for nearly 17 years as a third
26 generation real estate broker? There is no evidence from the Respondent that there
27 was any complaint, solicited or otherwise, that any fee or commission related to any act
28 requiring a real estate license for any closed sale for which Petitioner participated. The
fact remains that fees for marketing are not subject to Commission oversight, and the

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fact that Petitioner was licensed should be considered a benefit, not a detriment. Under Respondent's reasoning, newspapers and real estate magazines and all other marketing companies of every nature, and their respective websites, should have a responsible broker, and require that everyone associated with their marketing company be licensed. The Commission, therefore, had no justification for terminating Petitioner's business license for continuing to offer home marketing, and the end result is that the Commission is fixing "commissions" while "interfering with free trade" in attempting to control consumer options.

CONCLUSION

The Hearing Officer and the Idaho Real Estate Commission had insufficient opinions that completely ignored evidence that a reasonable mind might accept as adequate to support a conclusion that Petitioner was not intentionally engaging in any act that was improper, and certainly no act that warrants a revocation of Petitioner's real estate license. If, not for the flat fee marketing program... we simply would not be here and the light of objectivity clearly demonstrates that the Petitioner's actions do not warrant the recommended order handed down by a not so really independent hearing officer... which then became a final edict issued by Respondent. The McCarthy era should not be revisited in this case and the record should be made straight in restoring Petitioner's integrity, reputation and good business ethics that clearly benefit the consumer and the entire community.

Respectfully submitted this 18 day of March 2010.


MICHAEL SCOTT MACLAY,
PETITIONER
3304 N. Park Road
Spokane Valley, WA 99212

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2010, I caused to be served, by fax transmission, a true and correct copy of the Petitioner's Reply to Respondent's Response Brief upon:

Kirtlan G. Naylor
Naylor and Hales, P.C.
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Fax: 1-208-383-9516

Dated this 18th day of March 2010.

Michael Scott MacLay
MICHAEL SCOTT MACLAY
PETITIONER

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Petitioner,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent.

Case No. CV-OC0907296

MEMORANDUM DECISION
AND ORDER

This matter is before the Court on appeal from the Idaho Real Estate Commission's (Commission's) finding that Petitioner Michael Scott Maclay (Maclay) violated various provisions of Idaho Code Title 54, Chapter 20 and from its decision to revoke Maclay's Idaho real estate license and require Maclay to pay a civil fine of \$5,000.00. Maclay argues that the facts do not support any finding of misconduct, dishonesty, recklessness, or deceit and that his actions do not provide a basis for the revocation of his real estate license. He asks the Court to review the record and remand the case to the Commission to address the facts and law he presented. For the reasons set forth below, the Court affirms the Commission's decision.

FACTUAL & PROCEDURAL BACKGROUND

Maclay began working as a licensed real estate sales agent in Idaho in 2000. He associated with eight brokers between 2000 and 2005, and then on March 10, 2006, he became licensed with a broker named John Runkle (Runkle) at RealTeam Real Estate Center, Inc. (RealTeam).

1 Just two days before Maclay began working with RealTeam, Mark Wanner and Juanita
2 Sanchez signed an exclusive seller representation agreement on which Maclay designated himself as
3 the agent. The agreement does not contain a beginning or expiration date for the term of the
4 agreement. Brokerage fees are provided for, but no additional fees such as a flat listing fee are
5 included.¹ Maclay did not sign the agreement, and neither did any other agent or broker.

6 After Maclay began working for RealTeam, Maclay arranged for Idaho property owners to
7 pay an upfront marketing fee to either Maclay or RealTeam for property to be listed on the Multiple
8 Listing Service (MLS). Maclay accepted "flat fees from sellers who wanted flat fee access into the
9 MLS as a marketing fee, only." However, these flat fees were generally noted on exclusive seller
10 representation agreements as an additional fee to the brokerage fee. If a seller paid a flat fee of \$295,
11 Maclay would visit the property, do a comparative market analysis, discuss pricing, discuss the
12 option of having ads run in the newspaper and Craig's List, list the property on MLS, and place a
13 RealTeam sign in the yard with Maclay's phone number on it. If the seller procured a purchaser, the
14 seller would not pay the brokerage fee of 3%, but if Maclay procured a purchaser, the seller would
15 pay the brokerage fee. Accordingly, if a potential buyer called the phone number on the sign that
16 Maclay placed in the yard, Maclay would show the home and attempt to sell the property.

17
18
19 Ken and Carolyn Jackson signed an exclusive seller representation agreement on March 24,
20 2006 and paid the flat fee noted on the agreement to either Maclay or RealTeam. There is no price
21 filled in on the Jacksons' agreement. Nevertheless, Maclay placed a RealTeam sign in the yard,
22 listed the Jacksons' property on MLS, and looked for a buyer.

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26 ¹ During Maclay's deposition, he testified that he did not remember this agreement and that he did not remember whether Wanner paid a flat fee. There is no evidence in the record indicating that Wanner did in fact pay a flat fee.

1 Russ Rhuman signed an exclusive seller representation agreement on June 1, 2006 and paid
2 Maclay, not RealTeam, the \$295 MLS flat fee noted on the agreement. Maclay placed a RealTeam
3 sign in the yard and listed Rhuman's property on MLS.

4 Richard and Connie Matthiesen signed an exclusive seller representation agreement on July
5 25, 2006 which provided that a \$295 flat listing fee was to be paid to Maclay. Although Maclay
6 does not remember receiving a payment from the Matthesens, Maclay testified that it would have
7 been consistent with his practice for the Matthesens to pay him directly.

8 Steve and Kerri Smith signed an exclusive seller representation agreement on September 26,
9 2006 and later paid a \$499 upfront marketing fee to Hotline Properties on October 13, 2006.
10 Neither Maclay nor his broker signed the agreement. The agreement does not list a designated agent
11 and does not contain beginning and expiration dates for the term of the agreement. Nevertheless,
12 the Smith's property was listed on MLS through RealTeam, and Maclay was designated as the
13 listing a member. Maclay acknowledges that at some point he became responsible for the Smith's
14 MLS listing but he denies listing the property or being compensated for the representation. He
15 claims that the paperwork for the Smiths' property was prepared by Jerry Webb (Webb) as a result
16 of Webb's affiliation with Hotline Properties and not because of any request by Maclay.
17

18 During 2006, Runkle had a couple of conversations with Maclay regarding Maclay's
19 marketing strategy of charging an upfront fee for listing property in MLS. Runkle told Maclay that
20 he would only approve the use of an upfront fee for limited services if the sellers signed an
21 addendum acknowledging that they were receiving limited services for the upfront fee. According
22 to Runkle, he also told Maclay that before Maclay collected and kept upfront fees, he needed to get
23 a letter from the Commission saying that this type of activity is legal because Runkle did not believe
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25
26

1 that taking money without running it through the brokerage was permissible. Runkle did sign off on
2 some of the agreements.

3 Following these conversations, Runkle received a phone call from a man named Aaron
4 Klennert who stated that he paid an upfront marketing fee directly to Maclay. Runkle responded to
5 this news by terminating Maclay's employment on October 30, 2006.² After this termination,
6 Runkle received another phone call from a different person claiming that he paid an upfront
7 marketing fee directly to Maclay. Runkle subsequently filed a formal complaint with the
8 Commission alleging that Maclay failed to turn in funds the broker, took payments directly from
9 clients, misrepresented the brokerage, and purposefully failed to turn in files to the brokerage.
10

11 In January 2007, Maclay became licensed under a broker named George Kucera at Help-U-
12 Sell List 4 Less Realty (Help-U-Sell) in Idaho. Kucera was a licensed broker in both Washington
13 and Idaho, and he owned a Help-U-Sell franchise that was licensed in both Washington and Idaho.
14 Apparently at some point Kucera wrote a letter approving a flat fee arrangement.

15 On October 8, 2007, Kucera passed away. A qualified broker was not appointed to carry on
16 the Help-U-Sale franchise business in Idaho, so the Idaho license for Kucera's Help-U-Sell was
17 terminated on October 31, 2007. As a result, Maclay lost his sales agent license with Help-U-Sell in
18 Idaho. However, Maclay claims that Kucera left the franchise to him and that Maclay was
19 appointed an interim broker for the Help-U-Sell in Washington. Maclay started working towards
20 obtaining a broker's license in Idaho, but as of the hearing before the Commission on November 5,
21 2008, Maclay had not yet obtained a broker's license.
22
23
24

25 ² According to Maclay, he and Runkle talked about flat fees before Maclay even joined RealTeam. (Maclay Dep. 19:2-
26 4.) Maclay contends that Runkle terminated Maclay's employment after Runkle changed his mind about letting him
offer discounted listing programs with upfront marketing fees.

1 On October 29, 2007, Alann Krivor (Krivor) signed two exclusive seller representation
2 agreements, one for each of two properties located in Idaho. The agreements listed a brokerage fee
3 but no additional fees. John Dohm (Dohm), an agent working with Maclay, designated himself and
4 Maclay as the agents and initialed that the term of the agreement commenced on November 26,
5 2007.

6 On November 28, 2007, Krivor's properties were activated on MLS though Dohm and
7 Maclay were not licensed under a broker and a broker had not yet accepted the agreement. In the
8 MLS, Scott Maclay was named as the listing agent, and Treaty Rock Realty, Inc. (Treaty Rock) was
9 named as the listing brokerage though the data sheets for these properties each list Help-U-Sell as
10 the listing brokerage. Maclay is named as the listing agent in MLS, but he denies listing these
11 properties. Maclay also denies having knowledge that any paperwork had been completed with
12 respect to these properties until he later became licensed with Treaty Rock Realty, Inc.

14 On December 5, 2007, Maclay became licensed under broker Kirbi Swanson (Swanson)
15 with Treaty Rock. While Maclay was affiliated with Treaty Rock, Maclay only arranged one
16 upfront marketing fee that Swanson was aware of, and this fee was paid to the brokerage. Yet even
17 if Maclay only arranged for one upfront marketing fees, Maclay nevertheless advertised Idaho
18 properties listed with Treaty Rock, including the Krivor properties, on Kucera's Help-U-Sell
19 website. He noted a general affiliation between Treaty Rock and Help-U-Sell on the website though
20 there was no affiliation between the two companies recognized by the Commission, and he used the
21 Treaty Rock logo on the website.

23 During December 2007, Swanson asked Maclay to take the Treaty Rock logo and listings off
24 the Help-U-Sell website, but as of January 11, 2008, the logo, the Krivor properties, and other Idaho
25 properties were still on that website. Some of the Idaho properties were listed for sale by owner as
26

1 FSBO, but some were not. Treaty Rock subsequently terminated Maclay's license on January 31,
2 2008, and Maclay remained on inactive status until the Commission reviewed his case.

3 In August 2008, the Staff of the Idaho Real Estate Commission filed a complaint against
4 Maclay with the Commission. On November 5, 2008, the Commission and the designated hearing
5 officer held a hearing with respect to the complaint. On November 21, 2008, the hearing officer
6 issued her Findings of Fact, Conclusions of Law and Recommended Order; and on March 19, 2009,
7 the Commission adopted the recommended findings that Maclay violated Idaho Code §§ 54-
8 2040(5); 54-2050(1)(a), (c); 54-2053(2), (4); 54-2054(9); 54-2060(2), (3), (11), (12); and 54-2065
9 and 54-2002. The Commission then revoked Maclay's real estate license and ordered Maclay to pay
10 a civil fine of \$5,000.
11

12 Maclay subsequently filed a timely petition for judicial review.
13

14 **ISSUE ON APPEAL**

15 Whether the Commission's decision is supported by substantial evidence.
16

17 **STANDARD OF REVIEW**

18 In reviewing an agency's decision, an appellate court may not "substitute its judgment for
19 that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1).
20 Instead, the court must defer "to the agency's findings of fact unless they are clearly erroneous."
21 *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998);
22 *Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct. App. 2009).
23

24 Agency action must be affirmed on appeal unless the court determines that the agency's
25 findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory
26

1 provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d)
2 not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an
3 abuse of discretion. Idaho Code § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.3d at 506. The
4 party attacking the agency's decision bears the burden of demonstrating that the agency erred in a
5 manner specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131
6 Idaho at 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.3d at 506.

7 Agencies are given the authority to make their own determinations of credibility and "to
8 place greater or less weight on any particular piece of evidence according to its relative credibility."
9 *Morgan v. Idaho Dep't of Health & Welfare*, 120 Idaho 6, 8, 813 P.2d 345, 347 (1991); *see also*
10 *Cooper v. Bd. of Prof'l Discipline*, 134 Idaho 449, 457, 4 P.3d 561, 569 (2000). An appellate court
11 may not "scrutinize the weight and credibility of the evidence relied upon," and it may not "overturn
12 factual findings supported by substantial and competent evidence" even if there is conflicting
13 evidence. *Soto v. Simplot*, 126 Idaho 536, 539, 887 P.2d 1043, 1046 (1994) (citations omitted).
14
15

16 ANALYSIS

17
18 Maclay essentially asks this Court to review the record, weigh the evidence, and make its
19 own findings of fact. He contends that if the Court reviews all the evidence in the record, the Court
20 will find that Maclay acted "in good faith with a determined effort to abide by the rules." According
21 to Maclay, the hearing officer failed to address any of Maclay's exhibits and failed to consider any
22 of the facts presented by Maclay.

23 As noted above, the Court may not engage in the type of review Maclay requests. The Court
24 may not determine what weight should be assigned to the evidence, and it may not make any
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1 findings of fact with respect to the record. Instead, the Court may only determine if the
2 Commission's decision is supported by substantial evidence on the record as a whole.

3 In this case, the Commission found evidence in the record that Maclay failed to comply with
4 various provisions of Idaho Code Title 54, Chapter 20, and Maclay does not argue that the evidence
5 the hearing officer relied upon does not support such a finding. Instead, Maclay asks the Court to
6 find that the evidence he presented does not support such a finding. However, to the extent that
7 evidence in the record supports the Commission's findings, consideration of Maclay's evidence will
8 not warrant a reversal.

9
10 If the Court reviews the record to determine whether there is substantial evidence to support
11 a finding that a person did not comply with the law, the Court will look for evidence of non-
12 compliance. The Court will not overturn the Commission's findings just because there is evidence
13 that a person attempted to comply with Idaho law or that the person complied with the law 90% of
14 the time. A good faith attempt to comply is irrelevant in determining whether there is evidence that
15 a person actually failed to comply with a law.

16
17
18 **1. Idaho Code § 54-2040(5)**

19 The hearing officer found that Maclay violated Idaho Code § 54-2040(5) by using Kucera's
20 broker's license after Kucera's death to carry on Kucera's Help-U-Sell brokerage. Maclay does not
21 deny that he was not a licensed broker in Idaho during the year following Kucera's death, and he
22 does not deny that he continued to use Kucera's Help-U-Sell after Kucera's death. Instead, Maclay
23 claims that he was properly using Help-U-Sell's website after Kucera's death because Kucera left
24 the business to Maclay and because the transfer of the Help-U-Sell franchise from Kucera to Maclay
25
26

1 was in the works. Maclay further claims that he was appointed an interim broker in Washington and
2 was appropriately using the Help-U-Sell website in Washington.

3 A sales agent may not use "another person's broker's license, whether for compensation or
4 not, to establish or carry on a business for which a broker's license is required [or] to manage and
5 control the office." Idaho Code § 54-2040(5). If a designated broker for a licensed business dies, a
6 sales agent may not carry on the business. Idaho Code § 54-2057. Only a qualified individual may
7 carry on the business, and only a broker properly licensed in Idaho is qualified to be responsible for
8 the activities of a licensed business in Idaho. Idaho Code §§ 54-2016, 54-2057. If a qualified
9 individual is not appointed within the time required by statute to carry on the business after a
10 broker's death, the business will cease to be licensed. Idaho Code § 54-2057.

12 Whether Maclay was in the process of obtaining Kucera's Help-U-Sell franchise and
13 whether Maclay was qualified or permitted to carry on Kucera's Help-U-Sell in Washington has no
14 bearing on whether Maclay was qualified to carry on Kucera's Help-U-Sell in Idaho. Idaho law
15 requires Maclay to be a licensed broker in Idaho to carry on the responsibilities of a business's work
16 in Idaho, and Maclay admits that he was not a licensed broker in Idaho. Because Maclay was not a
17 licensed broker, because a licensed broker was not appointed to carry on Kucera's Help-U-Sell
18 business in Idaho, and because the Idaho license for Kucera's Help-U-Sell in Idaho had been
19 terminated, Maclay lacked the legal right to carry on the business activities of Help-U-Sell in Idaho.
20 Nevertheless, Maclay used the Help-U-Sell website to advertise Idaho real estate and not all of the
21 Idaho Real Estate was listed as FSBO. This evidence supports a finding that Maclay was carrying
22 on Help-U-Sell's business in Idaho in violation of Idaho Code § 54-2040.
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2. Idaho Code § 54-2050(1)(a) and (c)

The hearing officer also found that Maclay violated subsections (a) and (c) of Idaho Code § 54-2050(1) because the Smith, Wanner, and Jackson seller representation agreements did not contain all of the information required by law. Maclay does not deny that these agreements were incomplete but instead argues that Runkle was responsible for the omissions. Maclay further contends that Runkle never told him to do anything different.

A seller representation agreement must contain “[c]onspicuous and definite beginning and expiration dates” as well as the “[p]rice and terms.” Idaho Code § 54-2050(1)(a), (c). Brokers bear the ultimate responsibility for making sure seller representation agreements are complete and conform to Idaho law, but sales agents who enter into the agreements with sellers on behalf of a broker also bear this responsibility. *See* Idaho Code §§ 54-2002, 54-2038(1), 54-2048, 54-2050.

Regardless of whether a broker informs a sales agent of the sales agent’s statutory responsibilities regarding seller representation agreements, Idaho’s real estate law informs sales agents that they must include certain information in seller representation agreements, and sales agents are obligated to follow the law. The evidence indicates that Maclay was appointed the sales agent for the Smith agreement and that he voluntarily became the sales agent for the Jackson agreement. As the responsible sales agent, Maclay had the responsibility of making sure that the seller representation agreements included all of the information required by law. Because there is uncontested evidence in the record that the Wanner, Jackson, and Smith agreements were missing required information and that Maclay acted as the agent for these sellers, there is sufficient evidence to support a finding that Maclay violated Idaho Code § 54-2050 by not ensuring that the seller representation agreements were complete.

1
2 **3. Idaho Code § 54-2053(2), (4)**

3 The hearing officer found that Maclay violated Idaho Code § 54-2053(2) by advertising
4 listed properties without listing the broker's licensed business name and by using a new brokerage
5 name without prior approval by the Commission with respect to Treaty Rock listings on the Help-U-
6 Sell website. In addition, the hearing officer found that Maclay violated Idaho Code § 54-2053(4)
7 by providing misleading information with respect to the Treaty Rock listings on the Help-U-Sell
8 website. Maclay claims that he was posting Treaty Rock listings on his Washington Help-U-Sell
9 website, not on an Idaho Help-U-Sell website, and that he used proper "disclosures" which made the
10 listings "perfectly acceptable and proper."
11

12 Real estate in Idaho must be advertised through a broker licensed in Idaho or through a sales
13 agent licensed in Idaho and designated by an Idaho broker. Idaho Code § 54-2053(1). All
14 advertisements for Idaho real estate must contain the name of the licensed Idaho broker and must
15 not contain information that is misleading to the public, prospective customers, or clients. Idaho
16 Code § 54-2053(2), (4). If the Idaho broker changes business names, the new business name "shall
17 not be used or shown in advertising unless and until a proper notice of change in the business name
18 has been approved by the commission." Idaho Code § 54-2053(2).
19

20 Even if Maclay had an interim broker's license in Washington that allowed him to use Help-
21 U-Sell in Washington, Maclay did not have a broker's license in Idaho that allowed him to use
22 Help-U-Sell to advertise Idaho real estate. After Help-U-Sell's license in Idaho was terminated,
23 Maclay obtained a sales agent license under Swanson, the broker at Treaty Rock, and this license
24 gave Maclay legal standing to advertise Idaho real estate through Treaty Rock. However, Swanson
25 was not affiliated with Help-U-Sell, and the Commission did not authorize Treaty Rock to become
26

1 affiliated with or otherwise change its name to Help-U-Sell. As a result, Maclay did not have legal
2 standing to advertise Treaty Rock listings on Help-U-Sell's website regardless of whether the Help-
3 U-Sell website was a Washington or an Idaho website. Because there is evidence that Maclay
4 advertised Treaty Rock listings on Help-U-Sell's website, though there was no affiliation between
5 the two entities and no official name change, and because there is evidence that Maclay did not
6 always include the broker's name, there is sufficient evidence to support a finding that Maclay
7 violated Idaho Code § 54-2053(2) and (4).
8
9

10 **4. Idaho Code § 54-2054(9)**

11 The hearing officer found that Maclay violated Idaho Code § 54-2054(9) by accepting real
12 estate fees not paid through the broker for the performance of acts requiring a real estate license.
13 Maclay does not deny that he accepted up front marketing fees but instead argues that these fees are
14 not subject to the Commission's oversight. He contends that "[s]imply posting notice that a
15 property is for sale—. . . whether through a sign in the yard, an advertisement in the paper, or a
16 description in a multiple listing service—requires no special skill or training and thus is not
17 something that does or should require a real estate license." In support of his position, Maclay relies
18 on an opinion letter written by Kucera in which Kucera concludes that listing property on an FSBO
19 website is not an activity requiring a real estate license and that a licensee may accept a marketing
20 fee for such an activity. (Respondent's Ex. A.)
21

22 In Idaho, a real estate license is required to sell, list,³ buy, or negotiate or to offer to sell, list,
23 buy or negotiate the purchase, sale, option, or exchange of real estate. Idaho Code §§ 54-2003(1)(a),
24

25 ³ Real estate is "listed" if it is placed "for sale under an agreement with a real-estate agent or broker." (Black's Law
26 Dictionary, 8th ed. 2004).

54-2004(33), (34). A license is also required to advertise Idaho real estate and to place a sign on Idaho real estate. Idaho Code § 54-2053(1). A person who engages in any of these actions engages in the business of real estate and must be licensed as a broker or be licensed under a broker as a salesperson. Idaho Code § 54-2002.

However, a person is exempt from this license requirement if the person is taking action to sell his own personal property. Idaho Code § 54-2003(1)(a). A property owner may independently advertise personal property in a newspaper or on a website without having a license or working through a licensed brokerage because the owner is not engaging in the business of real estate. *Id.*

Companies that merely provide resources for property owners to create and list their own advertisements are also exempt from the license requirement because they are not engaging the business of real estate within the meaning of Idaho's real estate law. *See* Idaho Code §§ 54-2002, 54-2004(5). These types of companies may publish advertisements in a magazine or on a website because they do not act as agents of the property owner or otherwise provide any assistance to the owner. For example, an FSBO company is simply a vehicle by which owners independently advertise and market their own personal real estate. Such a company does not assign agents to listings, and as the name of the company indicates, owners take complete responsibility for the advertisements.

Once a third party becomes involved with the sale of real property by entering into an exclusive representation agreement with an owner and taking action on behalf of an owner, the exemption from the license requirement no longer applies because the third party is acting as an agent or salesperson. A third party who creates an advertisement, lists property in MLS, and places a sign in the yard with a third party's phone number is doing more than simply allowing a seller to

1 communicate with others; he is engaging in the business of real estate. *See* Idaho Code §§ 54-2004,
2 54-2053.

3 If an agent acts on behalf of an owner by engaging in any of the activities listed in § 54-2004
4 or § 54-2053, any fees assessed for these activities must be paid to the designated broker, not the
5 agent. Idaho Code § 54-2054(9). "All fees must be paid through broker. No sales associate shall
6 accept any commission, compensation or fee for the performance of any acts requiring a real estate
7 license from any person except the real estate broker with whom the sales associate is licensed." *Id.*

8
9 In this case, there is undisputed evidence that Maclay did more than just post advertisements
10 of property on a website; he acted as an agent by entering into exclusive seller representation
11 agreements, posting property on MLS, and placing signs in yards that contained his phone number,
12 not the phone numbers of the sellers. There is also undisputed evidence that the flat fees assessed
13 for these activities were paid directly to Maclay. Because Maclay's activities were those requiring a
14 license and because the fees for these activities were not paid to the broker, the evidence supports a
15 finding that Maclay violated Idaho Code § 54-2054.

16
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18 **5. Idaho Code § 54-2060(2), (3), (11), (12)**

19 The hearing officer found that Maclay violated Idaho Code § 54-2060(2), (3), (11), and (12)
20 by engaging in a continued or flagrant course of misrepresentation, by not accounting for or
21 remitting money belonging to the brokerage, by dealing dishonestly or dishonorably, and by
22 engaging in gross negligence or reckless conduct. Maclay contends that he at all times acted in
23 good faith and with an effort to abide by the rules. He accuses the Commission of basing its
24 conclusions on perceptions and not the facts, and he claims in his reply that the hearing officer
25 abused his discretion by not giving any weight to Maclay's evidence.
26

Pursuant to Idaho Code § 54-2060, the following acts shall constitute misconduct:

- (2) Engaging in a continued or flagrant course of misrepresentation or making of false promises, whether done personally or through agents or salespersons . . .
- (3) Failure to account for or remit any property, real or personal, or moneys coming into the person's possession which belong to another . . .
- (11) Any other conduct whether of the same or a different character than hereinabove specified which constitutes dishonest or dishonorable dealings . . .
- (12) Gross negligence or reckless conduct in a regulated real estate transaction. Conduct is grossly negligent or reckless if, when taken as a whole, it is conduct which substantially fails to meet the generally accepted standard of care in the practice of real estate in Idaho.

In this case, Maclay's conduct supports a finding that Maclay engaged in a continued or flagrant course of misrepresentation. Maclay's continued use of Kucera's Idaho brokerage and website, listing Treaty Rock properties on that website after Maclay had been asked to remove the listings and also despite the lack of permission from Help-U-Sell,⁴ supports a finding that Maclay acted dishonestly or dishonorably. Maclay's failure to turn over flat fees to RealTeam for licensed work supports a finding that Maclay did not account for or remit money belonging to the brokerage. Maclay's preparation of exclusive representation agreements while unlicensed, Maclay's failure to ensure that agreements were completely filled out, and Maclay's listing of the Krivor properties in MLS while unlicensed supports a finding that Maclay engaged in gross negligence or reckless conduct. None of these findings relate to Maclay's primary concern, the flat fee arrangement.

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6. Idaho Code §§ 54-2065 and 54-2002

Finally, the hearing officer found that Maclay violated Idaho Code §§ 54-2065 and 54-2002 by acting as a real estate sales agent and posting Idaho properties on Help-U-Sell though Maclay was not licensed through Help-U-Sell and Help-U-Sell was not a licensed brokerage. Again, Maclay claims that he had been working with an individual from Help-U-Sell's corporate office and that a transfer of Help-U-Sell from Kucera to Maclay was in the works.

A person who engages in the business or acts in the capacity of a sales agent in Idaho without a license is in violation of Idaho's real estate law and is subject to both civil and criminal penalties. Idaho Code §§ 54-2002, 54-2059, 54-2065. The commission may conduct investigations and administrative proceedings, and if it finds that a person acted without a required license, the Commission may impose a civil penalty in an amount not greater than \$5,000.00 for a violation of Idaho Code § 54-2002. Idaho Code § 54-2059; *Staff of Idaho Real Estate Comm'n v. Parkinson*, 100 Idaho 96, 98, 593 P.2d 1000, 1003 (1979). Conversely, the State may file a misdemeanor charge against a person for acting without a required license, and if the person is found guilty, the court may punish that person "by a fine of not to exceed five thousand dollars (\$5,000), or by imprisonment in the county jail for a term not to exceed one (1) year, or by both." Idaho Code § 54-2065.

The evidence in this case is undisputed that Maclay was advertising Idaho real estate listed with Treaty Rock on Help-U-Sell's website after Help-U-Sell's Idaho license and Maclay's Help-U-Sell license had been terminated. Because Maclay was no longer licensed in Idaho through Help-U-Sell and because the law requires him to be licensed through Help-U-Sell in order to advertise Idaho

⁴ Although a deal may have been in the works, there is no evidence that a deal had been reached at the time Maclay used the website.

1 real estate through Help-U-Sell, Maclay's continued use of Help-U-Sell to advertise Treaty Rock
2 listings supports a finding that Maclay violated Idaho Code § 54-2002 by acting without a license.
3 This finding provides a basis for the Commission to impose a civil penalty. The Commission did
4 not impose criminal penalties.
5

6
7 **CONCLUSION**

8 For the reasons stated above, the Court affirms the Commission's decision.

9 IT IS SO ORDERED.

10 Dated this 25th day of June, 2010.

11 

12 Kathryn A. Sticklen
13 District Judge
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CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

MICHAEL SCOTT MACLAY
3304 N. PARK ROAD
SPOKANE VALLEY, WA 99212

KIRTLAN G. NAYLOR
NAYLOR & HALES, PC
950 W BANNOCK, STE 610
BOISE, ID 83702

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 4/28/10

By 

Deputy Clerk

1 Michael Scott Maclay
2 Petitioner (Pro Se)
3 3304 N. Park Road
4 Spokane Valley, WA 99212
5 (509) 714-7974

NO
3:30
RECEIVED
JUL 1 2010
CLERK OF DISTRICT COURT
IDAHO

7 **IN THE DISTRICT COURT OF THE 4th JUDICIAL DISTRICT**
8 **OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

9 Michael Scott Maclay,

Case No. CVOC0907296

10 Petitioner/Appellant

NOTICE OF APPEAL

11 vs.

12 Idaho Real Estate Commission,

13 Respondent/Respondent

14
15 **TO: THE ABOVE NAMED RESPONDENT, IDAHO REAL ESTATE COMMISSION,**
16 **AND YOUR ATTORNEY, KIRTLAN G. NAYLOR AT NA YLOR & HALES, P.C.,**
17 **Attorneys at Law, 950 W. Bannock Street, Ste. 610, Boise, ID 83702,**
18 **Telephone No. (208) 383-9511, Fax No. (208) 383-9516, AND THE CLERK OF**
19 **THE ABOVE-ENTITLED COURT**

20 **NOTICE IS HEREBY GIVEN THAT**

21
22 The above named appellant, Michael Scott Maclay, appeals against the above-
23 named respondent, Idaho Real Estate Commission, to the Idaho Supreme Court from
24 the MEMORANDUM DECISION AND ORDER entered in the above-entitled action on
25 the 28th day of June, 2010, Honorable Judge, Kathryn A. Sticklen, presiding.

26 Notice of Appeal - 1.
27
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00063

1 Appellant has a right to appeal to the Idaho Supreme Court, and the
2 Memorandum Decision and Order described in the preceding paragraph is an
3 appealable order under and pursuant to Rule (11(a)(2)) or (12(a)) I.A.R.

4
5 A preliminary statement of the issues on appeal which the Appellant then intends
6 to assert in the appeal, as attached to this Notice and by this reference incorporated
7 herein; provided, however that this list of issues on appeal shall not prevent the
8 appellant from asserting other issues on appeal

9 A reporter's transcript of the Hearing on May 18, 2010, is requested at this time,
10 only if the Court grants Appellant's Motion for a Waiver of Fees and Costs, which Motion
11 accompanies this Notice of Appeal. .

12 Appellant also requests that the record include all documents automatically
13 included under Rule 28, I.A.R.

14
15 **Furthermore, Appellant, Michael Scott MacLay, certifies as follows:**

16
17 Appellant is exempt from paying the transcript fee, cost to produce the record,
18 and the filing fee herein because he is indigent as established by motion and affidavit,
19 and the order, previously filed in this case. The previous Order waived the requirement
20 of Appellant paying for the cost of the transcript of the Agency proceeding (Initial
21 Hearing) but not the filing fee, and Appellant simply motions the Court at this time to
22 also waive the payment of the filing fee for this appeal as well as the cost to produce the
23 court and/or agency record for this appeal.

24 Service has been made upon Respondent pursuant to Rule 20, I.A.R.

25 Notice of Appeal - 2
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00064

Respectfully submitted this 6 day of August 2010.

Michael Scott MacLay
MICHAEL SCOTT MACLAY,
APPELLANT/PETITIONER

State of Washington)
County of SPOKANE) ss.

MICHAEL SCOTT MACLAY, being sworn, deposes and says:

That I am the appellant in the above-entitled appeal, and that all statements in this notice of appeal, including the attached list of issues for appeal, are true and correct to the best of my knowledge and belief.

Michael Scott MacLay
MICHAEL SCOTT MACLAY, APPELLANT

Subscribed and Sworn to before me this 6th day of August 2010.

Notary Public
State of Washington
KIM D KASEY
MY COMMISSION EXPIRES
March 06, 2011

Kym D Kasey
Notary Public,
State of Washington, County of Spokane
My Commission Expires: 3/6/2011

Notice of Appeal - 3

00065

PRELIMINARY LIST OF ISSUES ON APPEAL

1. Appellant did raise the issue of arbitrary, capricious, or an abuse of discretion as part of his Petition for Judicial Review, asserting many times over that the Respondent and the Administrative Hearing Officer ignored evidence presented by Appellant of his Broker's knowledge and tacit encouragement of his marketing practices, as well as other evidence presented that Appellant was cooperating with the Agency and was in compliance with Idaho real estate agency law following the death of his Idaho Broker.
2. Appellant further asserts, as an issue on appeal, that the Respondent's actions are in violation of and in excess of statutory and administrative authority, in that Respondent does not have jurisdiction over marketing fees, and more importantly that Appellant's Broker is responsible for his acts and gave approval to the acts relating to the marketing fees.
3. Appellant further asserts as an issue on appeal that there is no limit on the number of broker associations an agent may have so that the listing and marketing of properties on web-site showing both Washington and Idaho listings and different listing agencies is permitted, thus Appellant was not in violation of any Idaho law in so doing.
4. The Court's ruling in effect has a chilling, anti-competitive effect on the real estate industry and thus limits Idaho citizens' freedom of choice in deciding how to market their real estate for sale.
5. The punishment does not fit the crime. Examining each individual allegation against Appellant, as separate events, shows how little substance there to Respondent's concerns. A Broker who signed off on the marketing fees; no requirement under Idaho law that marketing fees be paid through the broker, an unsigned form or two, a matter of a few weeks of relative inactivity following the death of a broker, listing property on a website that had listings for multiple agencies in both Washington and Idaho—which conduct is entirely permitted

1 under Idaho law—speak volumes about the relatively harmless nature of
2 Appellant's alleged misconduct, yet Respondent has come down on Appellant
3 like he has committed the most despicable of acts. Given the benign nature of
4 Appellant's course of conduct, the revocation of his Idaho real estate license and
5 the imposition of a large civil fine and other costs is in gross excess of
6 Respondent's statutory authority.

7 Appellant argued these issues to District Court, to no avail, and consequently seeks this
8 Appeal

9
10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on the 6 day of August, 2010, I caused to be served, by fax
12 transmission, a true and correct copy of this Notice of Appeal upon Respondent's
13 attorney:

14 Kirtlan G. Naylor
15 Naylor and Hales, P.C.
16 950 W. Bannock Street, Ste. 610
Boise, ID 83702
Fax: 1-208-383-9516

17 Dated this _____ day of August 2010.

18
19 Michael Scott MacLay
20 MICHAEL SCOTT MACLAY
21 APPELLANT
22
23
24

25 Notice of Appeal - 5
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00067

AUG 23 2010
by J. DAVID MAATRO
CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Appellant/Petitioner,
vs.

IDAHO REAL ESTATE COMMISSION,

Respondent/Respondent.

Case No. CVOC0907296

**ORDER FOR WAIVER
OF COSTS ON APPEAL**

Having reviewed the Appellant's Motion for Waiver of Appeal Transcript Fees on the above captioned case, and being advised in the premises;

IT IS HEREBY ORDERED, pursuant to Idaho Code §31-3220, that the costs of the following shall be waived:

- (✓) Filing Fee
- (✓) Clerk's Record
- () Reporter's Transcript

The cost of the clerk's record shall be paid from the District Court Fund.

IT IS SO ORDERED.

Dated this 19th day of August, 2010.

Kathryn A. Sticklen
KATHRYN A. STICKLEN
Senior District Judge

CERTIFICATE OF MAILING


I hereby certify that on August 18th, 2010, I have delivered a true and accurate copy of the foregoing document to the following parties in the method indicated below:

MICHAEL SCOTT MACLAY
3304 N. PARK ROAD
SPOKANE VALLEY, WA 99212

KIRTLAN G. NAYLOR
NAYLOR & HALES, PC
950 W BANNOCK, STE 610
BOISE, ID 83702

APPEALS OFFICE
ADA COUNTY COURTHOUSE
VIA: INTERDEPARTMENTAL MAIL

J. David Navarro
Clerk of the Court


Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Petitioner-Appellant,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent-Respondent on Appeal.

Supreme Court Case No. 37946

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Agency Record, filed May 29, 2009.
2. Transcript of Hearing Held November 5, 2008, Idaho Real Estate Commission, Boise, Idaho, received October 7, 2009.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 30th day of September, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BHADLEY J. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Petitioner-Appellant,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent-Respondent on Appeal.

Supreme Court Case No. 37946

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

MICHAEL S. MACLAY

APPELLANT PRO SE

SPOKANE VALLEY, WASHINGTON

KIRTLAN G. NAYLOR

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: SEP 30 2010

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

00071

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL SCOTT MACLAY,

Petitioner-Appellant,

vs.

IDAHO REAL ESTATE COMMISSION,

Respondent-Respondent on Appeal.

Supreme Court Case No. 37946

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 6th day of August, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE TO RECORD

00072